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No. 85-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DENNIS M. O'CONNOR, *et al.*,
Petitioners,

vs.

MAGNO J. ORTEGA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether it is a violation of a government employee's civil rights for government officials to make an administrative inventory of papers in a government office assigned to him while he is undergoing an administrative investigation.

PARTIES BELOW

PETITIONERS: Dennis M. O'Connor, Richard Friday, Dorothy Owen, Stefan Donoviel

RESPONDENT: Magno J. Ortega

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A-1 to A-7) is reported at 764 F.2d 703 (1985). The judgment of the United States District Court (Pet. App. A-8) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on June 27, 1985. The petition for a writ of certiorari was filed on September 25, 1985. On December 9, 1985, a writ of certiorari was granted limited to the first question in the petition. U.S. , L.Ed.2d , S.Ct. .

The jurisdiction of this court is involved under Title 28, United States Code section 1254(1).

CONSTITUTIONAL PROVISIONS AND APPLICABLE FEDERAL LAWS

1. United States Constitution, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Title 42, United States Code Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

This case arises out of a complaint by respondent that his Fourth Amendment rights were violated under 42 U.S.C. § 1983 by hospital administrators of Napa State Hospital who entered his locked, government-owned office without a warrant to conduct an administrative inventory of his papers. On cross-motions for summary judgment, the District Court granted the petitioners' motion on all grounds raised. (Pet. App. A-8.) The Court of Appeals reversed the trial court's decision on the claim of a violation under 42 U.S.C. § 1983.[1]

Petitioners Dennis M. O'Connor, Richard Friday, Dorothy Owen, and Stefan Donoviel were all employees of the Napa State Hospital of the State of California. Dr. O'Connor was the Executive Director; Mr. Friday was the hospital administrator; Mr. Donoviel was the Clinical Director, and Ms. Owen was the personnel officer of said hospital. (J.A. 2, 18.) Respondent, Dr. Magno J. Ortega, is a licensed physician and psychiatrist who had held the position of Chief of Professional Education at Napa State Hospital from 1964 to September 22, 1981. (J.A. 13.)

On July 30, 1981 Dr. O'Connor informed Dr. Ortega that he planned to investigate the management practices of Dr. Ortega's department. (J.A. 8, 27-28.) Previously Dr. O'Connor had received complaints against Dr. Ortega. These complaints included charges that 1) medical residents had been coerced into purchasing a computer;[2] 2) Dr. Ortega had entered into improper contracts involving the computer; 3) female residents had been sexually harassed; and 4) a doctor had been improperly placed on involuntary leave by Dr. Ortega. (J.A. 30, 31, 49; Pet. App. A-10 to A-15.)

At the July 30 meeting, Dr. O'Connor stated that he intended to place Dr. Ortega on administrative leave. Dr. Ortega instead requested that he be permitted to take two

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[1] Several other issues decided in the District Court in petitioners' favor are not involved here. Respondent appealed only two matters to the Court of Appeals: 1) the Fourth Amendment issue; and 2) whether or not respondent's pendent state claims were barred for failure to comply with the California Torts Claims Act. The Court of Appeals affirmed the trial court's decision on the pendent state claims issue. Respondent did not appeal the tort claims issue. (Pet. App. A-1 to A-7.)

[2] In August of 1981, Dr. O'Connor and Mr. Friday believed the computer was hospital property donated to the institution by a computer distributor. (J.A. 30, 35, 49-50.)

weeks vacation commencing on Friday, July 31, 1981. Dr. O'Connor confirmed the request in a memo which further directed Dr. Ortega to remain off hospital grounds unless he had Dr. O'Connor's written approval to return. (J.A. 8.) On Friday, August 14, 1981, Dr. O'Connor ordered Dr. Ortega by letter to go on administrative leave with pay because the investigation was incomplete. (J.A. 9.)

Shortly after the July 30, 1981 meeting with Dr. Ortega, Dr. O'Connor selected three hospital personnel to investigate the charges against Dr. Ortega. They included an accountant (Mr. Arnold), a physician (Dr. Laskay), and a hospital peace officer attached to security service (Mr. Stratton). (J.A. 34, 48, 62-63.) Mr. Friday directed the investigative team. As part of the investigation he authorized entry into the office to have state property identified and secured, including residents' files. (J.A. 50-51, 58-59.) Further justification for the entry was based on a report to Dr. O'Connor that Dr. Ortega had returned to hospital grounds and removed the computer in question from the hospital to his home during the weekend of August 15th and 16th.[3] Dr. O'Connor was concerned that a theft of state property may have occurred. (J.A. 35-36.)

Sometime after the weekend the computer was removed, and in the continuing course of the investigation, Dr. Ortega's office door was unlocked, his office entered, and its contents inventoried.[4]

On April 10, 1984, cross-motions for summary judgment were made in the District Court by petitioners and respondent. The District Court granted petitioners' motion for summary judgment on all issues raised, and denied respondent's motion in its entirety. The District Court found the administrative search reasonable citing the three-prong test raised in *Chenkin* v. *Bellevue Hosp. Ctr. N.Y.C., Etc.*, 479 F.Supp. 207 (S.D. N.Y. 1979). It found there was a public necessity to secure the office, particularly when the computer had been removed. It found the search efficacious since state property was secured and the contents of the office were removed so that the office could be

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[3] The Court of Appeals implies that Dr. O'Connor was aware that Dr. Ortega removed the computer to his home on weekends. This is in direct conflict with testimony of petitioners O'Connor and Friday. Each denied such knowledge until mid-August 1981. (J.A. 18-19, 35-36.)

[4] See footnote 5 for a description of the inventory.

used by another employee. It also found the degree of intrusion in the seizure of the personal effects was minimized by the fact that plaintiff could have secured his effects but chose not to do so. (J.A. 22-25.)

The Court of Appeals reversed the decision of the trial court and found that Dr. Ortega had a reasonable expectation of privacy in his office which society was prepared to accept and protect as reasonable. (764 F.2d 703 at p. 705.) The Court of Appeals held that Dr. Ortega had a great expectation of privacy in his office since his name was on the door, the office was kept locked, and he believed he had the only key. The office was also likely to contain sensitive and confidential information about Ortega's patients as well as personnel files. (*Id.*, at 706.) The court further found that Napa had never instituted a general inspection policy which might have defeated Dr. Ortega's expectation of privacy. (*Id.*, at 706-707.) The Court of Appeals reversed the decision for the petitioners, granted judgment to respondent, and remanded to the trial court only on the issue of damages. (*Id.*, at 707.)

SUMMARY OF ARGUMENT

Respondent has failed to identify a constitutional right cognizable under 42 U.S.C. § 1983 in bringing this action against petitioners, officials and administrators of Napa State Hospital as a result of their authorization for the entry and inventory of respondent's office in the course of an administrative investigation into the latter's work-related conduct. Identification of such a right is a necessary first step in any § 1983 action. (*Baker* v. *McCollan*, 443 U.S. 137, 140 (1979); *Martinez* v. *California* 444 U.S. 277, 284 (1980).)

Petitioners submit neither entry into nor inventory of respondent's office in the course of their supervision and investigation of respondent was conduct within the contemplation of Fourth Amendment protection. Although the scope of the Fourth Amendment extends to one's office, the "practical realities involved in the administration of a government office" (*Connick* v. *Myers*, 461 U.S. 138, 154 (1983)) as well as considerations of social costs (*Bush* v. *Lucas*, 462 U.S.

367 (1983); *Bishop* v. *Wood*, 426 U.S. 341 (1976)) foreclose Fourth Amendment applicability to government's entry and inventory of its employee's office for supervision or administrative investigation purposes.

Moreover, a public employee can lay no claim to a legitimate expectation of privacy in the office in such a context which society would accept as reasonable. Federal decisional law is virtually unanimous in its recognition that such governmental action is necessary and reasonable and intrudes upon no reasonable expectation of employee privacy.

Assuming, arguendo, the entry and inventory of respondent's office was subject to Fourth Amendment protection, the action of petitioners was reasonable and did not constitute an unreasonable search. Significant governmental needs of efficient operation through effective supervision, employee discipline, and preservation of informality in the employment relationship, when balanced against a minimal privacy interest of the employee, justify only a greatly reduced standard of Fourth Amendment protection. Warrant, probable cause, and reasonable suspicion standards which apply in the contexts of the traditional criminal search or the business/premises inspection are not relevant here. Instead, such governmental action is reasonable when based upon concern for an employee's work-related activity. Finally, petitioners submit the entry and inventory of respondent's office was reasonable and not actionable under § 1983.

ARGUMENT

NEITHER ENTRY INTO RESPONDENT'S GOVERNMENT OFFICE NOR INVENTORY OF ITS CONTENTS IN THE COURSE OF PETITIONERS' ADMINISTRATIVE INVESTIGATION INTO RESPONDENT'S EMPLOYMENT ACTIVITY VIOLATED RESPONDENT'S CIVIL RIGHTS UNDER 42 U.S.C. SECTION 1983

A. At The Threshold, Respondent Has Not Identified A Constitutional Or Other Right Cognizable Under 42 U.S.C. Section 1983

The legislative history of § 1983 demonstrates that it was intended to "[create] a species of tort liability" in favor of persons who are deprived of "rights, privileges or immunities secured" to them by the Constitution. (*Carey* v. *Piphus,* 435 U.S. 247, 253 (1978); *Imbler* v. *Pachtman,* 424 U.S. 409, 417 (1976); *Mitchum* v. *Foster,* 407 U.S. 225, 238-242 (1972); *Monroe* v. *Pape,* 365 U.S. 167, 172-183 (1961).)

The Court, in *Baker* v. *McCollan,* 443 U.S. 137, 140 (1979), reiterated the fundamental principle concerning *any* 42 U.S.C. § 1983 action that before liability under the statute

> ". . . can be meaningfully explored, it is necessary to isolate the precise constitutional violation . . . charged. For § 1983 imposes civil liability only upon one
>
> > 'who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws.* . . .' (42 U.S.C., § 1983.)
>
> The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" [Original emphasis.]

The Court hastened to observe that identification of a constitutional right allegedly infringed in a particular case is a necessary and initial step in a § 1983 suit. (*Martinez* v. *California,* 444 U.S. 277, 284 (1980); *Baker* v. *McCollan, supra,* 443 U.S. 137, 140 (1979); *Paul* v. *Davis,* 424 U.S. 693, 700-701 (1976).) The following analysis of this necessary first step process demonstrates respondent has not established a viable claim under § 1983, because he has failed to identify a right subject to Fourth Amendment protection which was infringed when officials of the government agency employing him authorized and conducted the entry and inventory[5] of his assigned government office in the course of its administrative investigation into respondent's management practices and other work-related conduct.

B. The Entry Of Respondent's Office And Inventory Of Its Contents Were Not Intrusions For Fourth Amendment Purposes

Petitioners, at the threshold of their Fourth Amendment analysis, tender for the Court's consideration the specific question of whether the Fourth Amendment applies to a government's administrative inventory of the contents of an office assigned to its employee in the course of the agency's administrative investigation into the employee's work-related conduct.

In making their initial submission that the Fourth Amendment does not apply in such a context, petitioners are mindful that the Court has applied Fourth Amendment guarantees

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[5] Various terminology has been used in this case to characterize the contact made with the contents of respondent's office. In the Petition for Writ of Certiorari, petitioners, in presenting the question, described the activity as an "inventory of papers." The opinion of the Court of Appeals states "investigating officials attempted to sort through the items . . . took some for use in the ongoing investigation . . . and . . . removed the items from the office for storage in a special locked area, where they were available for [respondent] to pick them up." (764 F.2d at p. 704; see also Appendix to Petition for Writ of Certiorari.) Both petitioner O'Connor, the Executive Director of Napa State Hospital, who authorized the investigation (J.A. 37.) and petitioner Friday, Business Manager of the hospital, who oversaw the investigation (J.A. 48-50.) testified their purpose was to identify and separate state property from personal, and to maintain access to government records. The official assigned to the task described the attempted separation as impossible and boxed the materials. (J.A. 61-63.) For purposes of consistency and simplicity, petitioners continue to refer to the activity as an "inventory."

beyond the "paradigmatic entry" into a home by police officers in search of evidence for the prosecution of crime. (*Michigan* v. *Tyler,* 436 U.S. 499, 504 (1978).) Protection of the Fourth Amendment extends to an office,[6] as well as business premises when searched or inspected to insure compliance with fire, health, and safety statutes and regulations.[7] As recognized in *Oliver* v. *United States,* 466 U.S. 170, 178, fn. 8, (1984), such protection is based upon "societal expectations that have deep roots in the history of the Amendment."

Furthermore, petitioners recognize the relevant corollary that Fourth Amendment strictures apply to state officials, whether criminal or civil, in safeguarding reasonable privacy interests against arbitrary governmental invasion. (*New Jersey* v. *T.L.O.,* 469 U.S. , 83 L.Ed.2d 720, 730, 105 S.Ct. 733 (1985).)

The Court, however, has addressed the intitial question of Fourth Amendment applicability in varying contexts,[8] and the issue is ripe for determination here.

The "practical realities involved in the administration of a government office" (*Connick* v. *Myers,* 461 U.S. 138, 154

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[6] In *Mancusi* v. *DeForte,* 392 U.S. 364 (1968), a warrantless search by criminal authorities of a union official's office for business records during the pendency of indictment proceedings was held to be in violation of the Fourth Amendment.

[7] *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 312-313 (1978) (holding a warrant is required for OSHA inspections); *Camara* v. *Municipal Court,* 387 U.S. 523, 528 (1967) (an inspection for housing code violation requires a warrant issued upon a standard less stringent than probable cause); *See* v. *City of Seattle,* 387 U.S. 541 (1967) applying the rationale of *Camara* to a safety inspection of business premises.

[8] See, e.g., *New Jersey* v. *T.L.O., supra,* 83 L.Ed.2d 720, 729 (1985) (holding Fourth Amendment applies to a public school official's search of a student's handbag); *Hudson* v. *Palmer,* 468 U.S. 517, 82 L.Ed.2d 393, 402-403, 104 S.Ct. 3194 (1984) (holding Fourth Amendment protection does not apply "within t. confines of the prison cell"); *Wyman* v. *James,* 400 U.S. 309, 316-318 (1971) (implying a social worker's home visitation to verify conditions justifying financial assistance under New York's AFDC program is not a traditional search within the contemplation of the Fourth Amendment). See also *Oliver* v. *United States,* 466 U.S. 170, 176-177 (1984) (reaffirming Fourth Amendment protection does not apply to "open fields").

(1983))[9] must be considered at this threshold juncture against a public employee's claim of violation of civil rights. Although a public employee does not relinquish consitutional rights by virtue of public employment (*Pickering* v. *Board of Education,* 391 U.S. 563 (1968)), the Court has carefully noted that in all of *Pickering's* progeny there is reflected "both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision becomes a constitutional matter."[10]

Over one hundred years ago, the Court recognized government's proper purpose in "promot[ing] efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service" *Ex parte Curtis,* 106 U.S. 371, 373 (1882), a purpose which Justice Powell noted in his separate opinion in *Arnett* v. *Kennedy,* 416 U.S. 134, 168 (1974):

> "To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

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[9] Although the Court in *Connick* engaged in a balancing of interests between First Amendment freedoms and a government employer's need to provide efficient public services, the majority opinion recognized there was "much force" to the position that a deputy district attorney's distribution of her questionnaire soliciting views on office morale and other problems following a change in her duty assignment was "wholly without First Amendment protection." (*Id.,* at p. 143.)

[10] *Connick* v. *Myers, supra,* 461 U.S. 138, 143 (1983). See also *Perry* v. *Sindermann,* 408 U.S. 593, 598 (1972); *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U.S. 274, 284 (1977); *Givhan* v. *Western Line Consolidated School District,* 439 U.S. 410, 414 (1979).

The case of *Bush* v. *Lucas*, 462 U.S. 367 (1983) dealt with the related context of a federal employee suing the federal government directly under the First Amendment[11] for a retaliatory demotion occasioned by the employee's public criticism of his agency. In refusing to create a new judicial damage remedy, the opinion of Justice Stevens for a unanimous Court identified significant policy considerations which apply with much force to the instant action:

> "Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available, it is clear that the question we confront today is quite different from the typical remedial issue confronted by a common-law court. The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue. That question obviously cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff. The policy judgment should be informed by a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees' First Amendment rights.
>
> The costs associated with the review of disciplinary decisions are already significant—not only in monetary terms, but also in the time and energy of managerial personnel who must defend their decisions. Respondent argues that supervisory personnel are already more hesitant than they should be in administering discipline, because the review that ensues inevitably makes the performance of their regular duties more difficult. Brief for Respondent 37-41. Whether or not this assessment is accu-

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[11] The Court noted, 462 U.S. at 374-375, the action as akin to one brought under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), which is, of course, the federal analogue of a § 1983 action. The Court assumed, without deciding, a First Amendment violation. (*Id.*, at p. 372.)

> rate, it is quite probable that if management personnel face the added risk of personal liability for decisions that they believe to be a correct response to improper criticism of the agency, they would be deterred from imposing discipline in future cases. In all events, Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees on the efficiency of the civil service. Not only has Congress developed considerable familiarity with balancing governmental efficiency and the rights of employees, but it also may inform itself through factfinding procedures such as hearings that are not available to the courts."[12]

The relevance of *Bush* to this case is the Court's recognition of the significant social costs[13] that would attend a public employee's option to convert a work-related dispute or grievance into a constitutional tort. Such social costs are unacceptable, as they ultimately prevent government from fulfilling its public trust.

Any analysis of social costs must be placed in context. (*Connick* v. *Myers, supra,* 461 U.S. 138, 153-154 (1983).) In this case, we are concerned with government's duties to oversee its employees, insure its mandated service is performed, and investigate possible misconduct relevant to the employee's performance of his duties. Specifically, we deal with government's entry into its employee's office and inventory of office contents in the course of an administrative investigation into concerns of work-related wrongdoing. An entry into and inventory of an employee's government-assigned office for such a purpose do not constitute a "search in the traditional criminal law context." (See *Wyman* v. *James, supra,* 400 U.S. 309, 317 (1971).) In *Wyman,* the Court reasoned that a social worker's home visitation for the purpose of monitoring health and decency conditions and verifying justification for public finan-

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[12] *Id.,* at pages 388-389. Petitioners realize that the result in *Bush* was substantially based upon the existence of comprehensive legislation of Congress regulating civil service employment, a factor "counselling hesitation" in the creation of a new judicial remedy. California also has enacted such a scheme. (See Cal. Gov. Code, §§ 19570-88, set forth in attached Appendix.)

[13] The issue of social costs is discussed in greater detail in Part D, *infra.*

cial assistance was not a search "in the Fourth Amendment meaning of that term." (*Ibid.*) It would defy reason and logic to hold that although government's visitation of a welfare recipient's home does not implicate Fourth Amendment protection, administrators of the social agency providing the benefit may not enter and inspect its employee's office to investigate or monitor performance without Fourth Amendment compliance. Yet, both respondent's position and the reasoning of the opinion of the Court of Appeals in this case call for such a result.

Office entry and inventory by administrators of a government agency for the purpose of supervising its employee and/or investigating work-related conduct is not a criminal investigation and should not be equated with one. Where the government employer does not act in aid of a pending criminal proceeding, it must have the same right to oversee its employees and investigate job performance as any private employer would have. If government's access to its own records and offices for the efficient conduct of its business is predicated upon Fourth Amendment pre-justification standards, provision of public services will truly suffer. Even *Mancusi* v. *DeForte, supra,* 392 U.S. 364, 369 (1968), in applying Fourth Amendment protection to a union official's shared office, in the context of a search of business records by criminal authorities during grand jury proceedings, recognized the reasonable assumption that such records were subject to the dominion of DeForte's "union superiors," or "union higher-ups."

In the context of supervision and administration, a government agency's access to the offices of its employees, and the contents of those offices, cannot be conditioned upon prior compliance with standards of Fourth Amendment protection. In this regard, there is a parity of reasoning between government's need to function through effective supervision of its employees and the rationale expressed in the business inspection cases that hold voluntary entry into an industry "closely regulated" by government removes reasonable ex-

pectations of privacy related to the object of regulation. (*United States* v. *Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970).)[14]

Government offices and their contents play a foreseeable and integral part in government's very essence, i.e., service to the public, and it is unreasonable for a government employee to claim Fourth Amendment thresholds must be successfully negotiated by administrative officials before they may gain access to these places for supervisory purposes. Justice Powell, in writing for the Court in *Davis* v. *Scherer,* 468 U.S. 183, 82 L.Ed.2d 139, 150, 104 S.Ct. 3012 (1984), wisely rejected a government employee's § 1983 claim where it, ". . . if adopted, would disrupt the balance that our cases strike between the interests in vindications of citizens' constitutional rights and in public officials' effective performance of their duties." As Justice Stevens cogently observed for the Court in *Bishop* v. *Wood,* 426 U.S. 341, 349 (1976), denying a § 1983 claim brought by a government employee:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."

Petitioners respectfully submit that the Fourth Amendment does not apply to an entry into and inventory of a public employee's government-assigned office by agency administrators in the context of supervision or administrative investigation into work-related conduct.

C. No Privacy Expectation That Society Is Prepared To Recognize As Reasonable Was Breached By Such An Entry And Inventory

In the course of a determination of whether Fourth Amendment protection applies in a given context, or following such a determination, the Court has further considered whether a claimed intrusion breached a legitimate expectation of privacy. (*Hudson* v. *Palmer, supra,* 468 U.S. 517, 82 L.Ed.2d 393,

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[14] See *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 313 (1978) for the Court's interpretation of *Biswell* and *Colonnade.* Indeed, government's needs in this case are even stronger than in the business inspection context.

400-404, 104 S.Ct 3194 (1984); *Wyman* v. *James, supra,* 400 U.S. 309, 318-326 (1971).) (See also *Oliver* v. *United States, supra,* 466 U.S. 170, 177 (1984).)

The Court stated in *Oliver:*

> "Since *Katz* v. *United States,* 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.' 389 U.S., at 360, 19 L.Ed.2d 576, 88 S.Ct. 507 (Harlan, J., concurring). The Amendment does not protect the merely subjective expectation of privacy, but only 'those expectations that society is prepared to recognize as "reasonable" ' *Id.* at 361, 19 L.Ed.2d 576, 88 S.Ct. 507. See also, *Smith* v. *Maryland,* 442 U.S. 735, 740-741, 61 L.Ed.2d 220, 99 S.Ct. 2577 (1979)." (*Oliver* v. *United States, supra,* 466 U.S. at 170, 177 (1984).) [Original emphasis.]

The Court in *United States* v. *Jacobsen,* 466 U.S. 109, 122 (1984) explained the critical difference between subjective expection of privacy and a reasonable privacy interest:

> "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities."

The Court in *Oliver* further stressed that a privacy interest must be "ligitimate":

> "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." (*Oliver* v. *United States, supra,* 466 U.S. 170, 182-183 (1984) [fn. omitted].)

A public employee's right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the need of agency officials and supervisors to have access to the offices of public employees, and their contents, to monitor performance, administratively investigate work-related conduct, or merely to retrieve government records. Government's need in this regard is obvious, reasonable, and indispensible to its efficiency. Further, such procedures and purposes are as reasonably foreseeable to a public employee as the common practice of a fellow employee's entry of an office to obtain a file or piece of correspondence, or borrow a paper clip. Such practical realities of office life render a privacy interest of the type respondent asserts unrealistic and unreasonable from a societal point of view. Society has no interest in government offices, desks, and file cabinets becoming citadels of inefficiency. Imposition of Fourth Amendment strictures in this context would unduly disrupt the critical governmental functions noted above and serve no legitimate expectation of employee privacy. Accordingly, the balance must be struck in favor of government's need to efficiently conduct its business.

At this juncture, it would be appropriate to review the federal circuit and district court opinions generally concerning the Fourth Amendment's application to a search of a public employee's office. The cases are not uniform in either factual context or search purpose, but all appear to recognize, in a balancing context, government's right as an employer to search its employee's office in the course of supervision or to investigate possible employee work-related misconduct.

In the initial case of *United States* v. *Blok*, 188 F.2d 1019 (CA D.C. 1951), police, without a warrant but with supervisor consent, searched a desk assigned to a government public employee's exclusive use in connection with a larceny investigation. It was held the search violated the Fourth Amendment, but the Court of Appeals observed in a consistently followed caveat:

> "No doubt a search of [the desk] without her consent would have been reasonable if made by some people in some circumstances. *Her official superiors might reasonably have searched the desk for official property needed for*

> *official use.* But as the Municipal Court of Appeals said, *the search that was made was not 'an inspection or search by her superiors.* It was precisely the kind of search by policemen for evidence of crime against which the constitutional prohibition was directed.' " (*United States* v. *Blok, supra,* 188 F.2d 1019, at 1021.) (Emphasis added.)

In *United States* v. *Collins,* 349 F.2d 863 (CA2 1965), criminal authorities investigating jewel theft searched the jacket of a custom official in a government office and extracted evidence used for a criminal conviction. The Court of Appeals, in citing the above and oft-quoted language of *Blok* concluded:

> "We hold, then, that, in the circumstances of this case, the search by government agents who were investigating the theft of property connected with the defendant's employment, of defendant's work jacket hanging in a public area in the Government office where he was employed, was reasonable within the intendment of the Fourth Amendment and, therefore, not unconstitutional." (*United* v. *Collins,* 349 F.2d 863, 868 (CA2 1965).)

Collins, while relying on *Blok's* reasoning, rendered a different result as the theft of jewels was connected with employment. The result of *Collins,* predating *Katz* v. *United States,* 389 U.S. 347 (1967), is of no force, but its adherence in principle to the *Blok* caveat is appropriate.

United States v. *Nasser,* 476 F.2d 1111 (CA7 1973) concerned criminal prosecution of an IRS attorney for conflict of interest. Evidence produced by electronic surveillance during the period of employment, and before *Katz,* was held not to be in violation of the Fourth Amendment on the rationale that a warrantless police search of the work area for evidence of work-related crime was not unreasonable. (*United States* v. *Nasser, supra,* at 1123.)

United States v. *Speights,* 557 F.2d 362 (CA3 1977) involved a criminal investigation into a police officer's possession of an illegal weapon. The defendant's police locker was

searched in the process. The Court of Appeals, struggling to distinguish no less than three[15] other "locker" cases upholding searches, pointed to special circumstances indicating agency acquiescense to a subjective expectation of privacy and ruled the search illegal. The criminal nature of the investigation in *Speights* distinguishes that case from the case at bar.

Gillard v. *Schmidt*, 579 F.2d 825 (CA3 1978) heavily relied upon by both the Court of Appeals[16] in this case and respondent, is in fact contrary to respondent's cause. Indeed, it is consistent with the general principle of *Blok, Collins,* and *Nasser* that a public employer may search an employee's office when the search is "work-related." In *Gillard,* a Board of Education member was offended by his depiction in a published political cartoon drawn by a public school counselor. The board member searched the counselor's desk to verify his involvement. While recognizing the counselor's expectation of privacy was breached and a 1983 claim was stated, the Court of Appeals expressly implied the search would have been proper if "work-related" and not merely the product of personal animus of a nonemployer:

> "Because the record contains no evidence that Schmidt was acting to recover government property, or was undertaking as an employer to monitor Gillard's

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[15] *United States* v. *Bunkers*, 521 F.2d 1217 (CA9 1975), cert. den., 423 U.S. 989 upheld a warrantless criminal search for stolen C.O.D. parcels of a postal employee's locker. *Shaffer* v. *Field*, 339 F.Supp. 997 (C.D. Cal. 1972), aff'd. 484 F.2d 1196 (CA9 1973), upheld a warrantless criminal search of the locker of a deputy sheriff. *United States* v. *Donato*, 269 F.Supp. 921 (E.D. Pa. 1967) aff'd. 379 F.2d 288 (CA3 1967), upheld a warrantless search of a U.S. Mint employee's locker. The *Speights* court reasoned the results were correct in *Bunkers, Shaffer,* and *Donato,* because each involved either a regulation or practice of such a search thereby providing notice. Notwithstanding *Speights* apparent willingness to accept the risk of government by proclamation, it is clear that *Speights* must be distinguished from this case as the foreseeable and necessary practice of government supervision of its employees provides the "notice" that *Speights* would require.

[16] The opinion of the Court of Appeals in this case fails to analyze the critical issue of whether respondent's subjective expectation of privacy was one which society would recognize as reasonable. Both the Ninth Circuit and respondent place mistaken reliance upon subjective privacy factors (respondent's seventeen year assignment to one office, respondent's faulty assumption he possessed the only key to his office, and respondent's utilization of government office space for storage of private practice patent records) in determining the question of whether his privacy expection was reasonable by society's standards. *Gillard* presents a similar defect in analysis.

> performance of his official duties, we have no occasion to determine the force of precedents which indicate that a public employer may invade an employee's privacy when the invasion is 'work-related.' *E.g., United States* v. *Nasser,* 476 F.2d 1111, 1123 (7th Cir. 1973) (IRS's search of employee's office to determine employee's proper work performance upheld); see *United States* v. *Hagarty,* 388 F.2d 713 (7th Cir. 1968) (search of government employee's office to secure criminal evidence violated fourth amendment.)" (*Gillard* v. *Schmidt, supra,* 579 F.2d at 829, fn. 1.)

The latest relevant circuit opinion rejects a federal employee's common-law action against his supervisors stemming from their search and inventory of his desk. (*Williams* v. *Collins,* 728 F.2d 721 (CA5 1984).) At 728 F.2d 728, the Court of Appeals notes:

> "It is by no means certain that Williams had a reasonable expectation of privacy in his government-furnished desk, in relation to the possibility of his supervisors entering the desk as part of an investigation of Williams' job performance or as part of an office inventory." [Citations omitted.]

The federal district court opinions concerning this issue overwhelmingly support the entry and inventory in this case.[17]

When the pertinent opinions of all the circuit courts of appeals and district courts are parsed, perhaps the most compelling analysis is found in *Allen* v. *City of Marietta,* 601 F.Supp. 482, 491 (N.D. Ga. 1985), to which petitioners fully subscribe:

> "This court believes that the theme underlying all of the cases discussing searches of government employees can be summarized as follows. Government employees do not surrender their fourth amendment rights merely because they go to work for the government. They have as much of

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[17] *Allen* v. *City of Marietta,* 601 F.Supp. 482, 490-491 (N.D. Ga. 1985); *Chocallo* v. *Bureau of Hearings and Appeals, SSA,* 548 F.Supp. 1349, 1364 (E.D. Pa 1982); *Chenkin* v. *Bellevue Hosp. Ctr., N.Y.C., Etc.,* 479 F.Supp. 207, 213-215 (S.D. N.Y. 1979); *Jafree* v. *Scott,* 372 F.Supp. 264, 273-274 (N.D. ILL., E.D. 1974); *United States* v. *Kahan,* 350 F.Supp. 784, 791 (S.D. N.Y. 1972).

> a right to be free from warrantless government searches as any other citizens. At the same time, however, the government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties. Thus, a government employee's superiors might legitimately search her desk or her locker or her jacket where the purpose of the search is not to gather evidence of a crime unrelated to the employee's performance of her duties but is rather undertaken for the proprietary purpose of preventing future damage to the agency's ability to discharge effectively its statutory responsibilities. Because the government as employer has the same rights to discover and prevent employee misconduct relevant to the employee's performance of her duties, the employee cannot really claim a legitimate expectation of privacy from searches of that nature."

In sum, petitioners submit their conduct violated no privacy expectation of respondent that society would accept as reasonable.

D. Excessive Social Costs Would Attend Fourth Amendment Application To Government's Entry And Inventory Of Its Employee's Office For Work-Related Purposes

As petitioners have recognized, Part B, *supra,* the Court has expressed concern over the significant social costs that would result from the conversion of a public employee's work-related dispute into a constitutional or other federal tort. (*Bush* v. *Lucas,* 462 U.S. 367 (1983); *Connick* v. *Meyers,* 461 U.S. 138 (1983).) Certainly, potential proliferation of § 1983 and *Bivens* litigation by disgruntled persons subject to the administrative process has concerned the Court. (*Butz* v. *Economou,* 438 U.S. 478, 515 (1978).) Immunity principles have been fashioned so as to prevent such a prospect and permit government officials to perform their jobs. (*Harlow* v. *Fitzgerald,* 457 U.S. 800, 816-817 (1982); *Imbler* v. *Pachtman,* 424 U.S. 409, 426-428 (1976).)

Just as the role of the prosecutor is likely to produce "with some frequency retaliatory suits by angry defendants," *Butz, supra,* 438 U.S. at 510, so the obstinate or vengeful public employee may easily convert an office inventory or inspection for records into an ascription of supervisorial malice and constitutional wrongdoing.

In the absence of a threshold barrier to such lawsuits, government officials will become ensnared in frivolous and time-consuming actions. Professor P. Schuck, who has exhaustively written on the subject of social costs attending suits against public servants, notes the probable responses of all officials to the threat of litigation as inaction, formalism, and changes in the character of decisions. (P. Schuck, *Suing Government* (1983) at pp. 59-81.)

Recognition of this action as viable under § 1983 would create intolerable burdens in the administration of a government office. Supervision would become a formalized product of Fourth Amendment prejustification standards. Agency inefficiency due to administrative paralysis would ultimately impair provision of government services. A § 1983 action could be triggered by an intended beneficiary suffering such denial or impairment of the service. Officials such as petitioners herein[18] would be placed on the horns of a sinister civil rights dilemma. Inadequate supervision or administration might lead to personal liability on the part of the official in favor of the intended beneficiary denied the needed service, whereas a proper level of public employee supervision by the same official might produce claims such as respondent's herein. Such a prospect must be avoided.

As the Court has noted in the past, such "practical realities involved in the administration of a government office" must be considered against a public employee's § 1983 claim. (*Connick* v. *Myers, supra,* 461 U.S. 138, 154 (1983); see also, *Bush* v. *Lucas, supra,* 462 U.S. 367 (1983).) Simply put, § 1983 is not the appropriate vehicle to review "the multitude of personnel

[18] See *Youngberg* v. *Romeo,* 457 U.S. 307 (1982), recognizing constitutional rights of developmentally disabled persons in state institutions to reasonable conditions of confinement and care.

decisions that are made daily by public agencies." (*Bishop* v. *Wood, supra,* 426 U.S. 341, 349 (1976).) The social costs of recognizing respondent's claim as viable under § 1983 are too great for society to bear.

Petitioners respectfully submit that based upon sound considerations of Fourth Amendment tradition and principles, as well as a considered inquiry into the excessive social costs that would attend extension of Fourth Amendment protection to government's entry and inventory of its employee's office for administrative purposes, respondent has failed to state a claim cognizable under the Federal Civil Rights Act (42 U.S.C., § 1983).

E. Assuming, Arguendo, Such An Entry And Inventory Was Subject To Fourth Amendment Protection, The Action Of Petitioners Was Reasonable Under An Appropriate Balancing Test

Assuming, arguendo, the entry and inventory of respondent's office was the type of intrusion which would invoke some level of Fourth Amendment protection on the rationale that an employee, whether in the public or private sector, brings personal items to the work place, such action was reasonable when viewed in "context" and "balancing the need to search against the invasion which the search entail[ed]." (*Camara* v. *Municipal Court, supra,* 387 U.S. 523, 536-537 (1967); see also *New Jersey* v. *T.L.O., supra,* 469 U.S. , 83 L.Ed.2d 720, 731-735, 105 S.Ct. 733 (1985).)

In *New Jersey* v. *T.L.O.,* the Court, in upholding a school official's search of a student's purse, balanced the reasonable privacy interests of a public school student against the needs of school teachers and administrators to (1) maintain school discipline and (2) preserve informality of the student-teacher relationship. Similarly, the needs of government to (1) operate efficiently and effectively through proper supervision and administration of its employees, (2) maintain discipline in the workplace, and (3) preserve the informality of the employer-employee relationship, dictate the reasonableness of an entry and inventory of a public employee's office by the employee's supervisors for work-related purposes.

Government's needs in this type of case are even greater than the needs recognized in *New Jersey* v. *T.L.O.*, for it is both foreseeable and reasonable that government have access to its employee's desks and file cabinets for the very purpose of conducting its business. Files, correspondence and other work-related materials are contained therein and must be retrieved, reviewed, or simply reassigned. School officials, although undeniably having an interest in securing weapons or contraband from a student's purse, do not rely upon access to the contents of such a container to conduct government business.

Furthermore, the need of government to maintain access to the offices of its employees for work-related purposes is reasonably foreseeable to every public employee. The employee's option of not bringing to the workplace contraband or highly personal items is much more reasonable than imposing strict Fourth Amendment standards upon governmental access to its employees' offices.

The question then becomes how should we strike the balance between any legitimate expectation of a public employee's privacy and the government employer's legitimate needs noted above. (See *New Jersey* v. *T.L.O., supra,* 469 U.S. at , 83 L.Ed.2d at 733, 105 S.Ct. 733 (1985).) In the words of the Court in *New Jersey* v. *T.L.O.*, " [t]he warrant requirement, in particular, is unsuited . . ." to the context of a governmental inventory of an office for work-related purposes. (*Id.*) Such a requirement would "unduly interfere" with government's ability to function. (*Id.*) Moreover, the warrant process would "frustrate the governmental purpose behind the search." (See *Camara* v. *Municipal Court, supra,* at 387 U.S. 532-533 (1967).)

The context of governmental supervision of its employees for work-related purposes renders the "probable cause" requirement and its accepted reducible levels[19] irrelevant to an

[19] Such as "reasonable suspicion" (e.g., *Terry* v. *Ohio,* 392 U.S. 1 (1968); *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975).

inventory of a public employee's office, because government's purpose is neither to detect crime (or its evidence) nor to enforce business inspection or regulation statutes.[20]

Rather, petitioners submit legality of such an intrusion should be based simply upon its reasonableness in light of all surrounding circumstances. (*New Jersey* v. *T.L.O., supra,* 469 U.S. at , 83 L.Ed.2d at 734, 105 S.Ct. 733 (1985).) In lieu of the somewhat formalized "twofold inquiry" applied in *New Jersey* v. *T.L.O.,*[21] petitioners suggest an office entry and inventory in the context under present scrutiny be deemed reasonable if conducted for a work-related concern. Such a test permits the involved government officials to identify the concern without judicial evaluation of the relative importance of various employment standards or rules. Such a test will spare government supervisors and administrators "the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." (*New Jersey* v. *T.L.O., supra,* 469 U.S. , 83 L.Ed.2d at 735, 105 S.Ct. 733 (1985).)

Finally, there remains the question of the legality of the office entry and inventory in this case. It is undeniable petitioners had legitimate concerns regarding respondent's work-related conduct. Petitioners received reports of respondent's sexual harassment of other employees and questionable possession of a computer on state hospital grounds. Petitioners were also concerned about respondent's management practices.[22]

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[20] Cf. *Camara* v. *Municipal Court, supra,* 387 U.S. 523, 528 (1967); *Marshall* v. *Barlow's, Inc., supra,* 436 U.S. 307, 312-313 (1978).

[21] The test of (1) justification for the search at inception, and (2) reasonable scope of the search is too strict in the context of this case, as such a standard still requires a confined pre-justification process conducive to the purpose of illicit activity detection.

[22] Respondent was eventually terminated from state employment following an administrative hearing conducted by the State Personnel Board. An independent hearing officer found, inter alia, respondent engaged in sexual harassment on the job, coerced employees under his supervision to contribute money for acquisition of a computer, and improperly placed a resident physician under his supervision on administrative leave, all in violation of California Government Code section 19572. (Pet. App. A-9 to A-15.)

After advising respondent he was under investigation for these work-related concerns, petitioners authorized entry into and inventory of respondent's office situated on state hospital grounds. The Court of Appeals opinion in this case (footnote 2) notes that motivation for the "search" was proper. In fact, concerns that state records and files in the office needed to be secured and that the matters needed investigation prompted the inventory.

There can be no argument the purpose of the entry and inventory was properly related to work-related activity of respondent. This was not a "search" within the traditional meaning of the Fourth Amendment, i.e., by police officers in search of evidence of crime. Petitioners were not acting as agents of prosecution authorities, and no criminal proceeding was pending against respondent. The inventory, which consisted of no more than an attempt to sort government property from respondent's, resulted in personal items being boxed and available for respondent's pickup from a secured area.

It is clear that by any conceivable standard of protection that could apply under these circumstances, the entry and inventory of respondent's office was reasonable and not in violation of the Fourth Amendment. Petitioners respectfully submit that to find their conduct violated the Fourth Amendment would have a chilling effect on governmental supervision of its employees and result in a multitude of personnel matters being placed before federal courts in a § 1983 context, a result to be avoided. (*Bishop* v. *Wood*, 426 U.S. 341, 349 (1976).)

* * * * *

CONCLUSION

For the foregoing reasons, petitioners urge this Court to reverse the decision of the Court of Appeals[23] and determine that neither the entry into nor inventory of respondent's office in the course of an administrative investigation into respondent's work-related activity gives rise to 42 U.S.C. § 1983 liability, as no Fourth Amendment right is infringed thereby.

Respectfully submitted,
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[23] The opinion never addresses adequacy of state remedies for due process purposes (*Parratt* v. *Taylor*, 451 U.S. 527 (1981), and the parties have never raised the issue. Were the issue presented, petitioners submit the combination of the state's statutory scheme for personnel actions and state and common-law remedies would suffice. (See *Bishop* v. *Wood*, *supra*, at p. 349; *Davis* v. *Scherer*, *supra*, 468 U.S. 183, 82 L.Ed.2d 139, 148, 104 S.Ct. 3012, (1984).)

APPENDIX

LAWS AND RULES GOVERNING THE CALIFORNIA STATE CIVIL SERVICE

CHAPTER 8. *Separations From Service*[24]

Article 3. Disciplinary Proceedings

§ 19570.

As used in this article "adverse action" means dismissal, demotion, suspension, or other disciplinary action.

§ 19571.

In conformity with this article and the board rule, adverse action may be taken against any employee, or person whose name appears on any employment list for any cause for discipline specified in this article.

§ 19572.

Each of the following constitutes cause for discipline of an employee, or person whose name appears on any employment list:

(a) Fraud in securing appointment.

(b) Incompetency.

(c) Inefficiency.

(d) Inexcusable neglect of duty.

(e) Insubordination.

(f) Dishonesty.

(g) Drunkenness on duty.

(h) Intemperance.

(i) Addiction to the use of narcotics or habit-forming drugs.

(j) Inexcusable absence without leave.

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[24] Statutory language is set forth as it existed in 1981.

(k) Conviction of a felony or conviction of a misdemeanor involving moral turpitude. A plea or verdict of guilty, or a conviction following a plea of nolo contendere, to a charge of a felony or any offense involving moral turpitude is deemed to be a conviction within the meaning of this section.

(l) Immorality.

(m) Discourteous treatment of the public or other employees.

(n) Improper political activity.

(o) Willful disobedience.

(p) Misuse of state property.

(q) Violation of this part or board rule.

(r) Violation of the prohibitions set forth in accordance with Section 19990.

(s) Refusal to take and subscribe any oath or affirmation which is required by law in connection with his employment.

(t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to his agency or his employment.

(u) Any negligence, recklessness, or intentional act which results in the death of a patient of a state hospital serving the mentally disabled or the developmentally disabled.

(v) The use during duty hours, for training or target practice, of any material which is not authorized therefor by the appointing power.

§ 19573.

Any employee who is or claims to be a citizen of any foreign country or is or claims to be a dual citizen of the United States and of any foreign country with which the United States is at war or who has renounced his citizenship or allegiance to

the United States or has taken an oath of allegiance or otherwise pledged allegiance to any foreign country with which the United States is at war or who has committed or commits any act of disloyalty to or disrespect towards the United States or its Flag or who does any act or thing when the United States is engaged in war to obstruct the war effort or the defense preparations of the United States, in addition to any other penalties provided by law therefor, is subject to discipline under this article.

§ 19574.

The appointing power, or any person authorized by the appointing power, may take adverse action against an employee for one or more of the causes for discipline specified in this article by notifying the employee of the action, pending the service upon the employee of a written notice. Adverse action is valid only if a written notice is served on the employee and filed with the board not later than 15 calendar days after the effective date of the adverse action. The notice shall be served upon the employee either personally or by mail and shall include: (a) a statement of the nature of the adverse action; (b) the effective date of the action; (c) a statement of the causes therefor; (d) a statement in ordinary and concise language of the acts or omissions upon which the causes are based; and (e) a statement advising the employee of his or her right to answer the notice and the time within which that must be done if the answer is to constitute an appeal.

§ 19574.1.

An employee who has been served with notice of adverse action, or an attorney admitted to the practice of law in this state and designated by the employee, shall have the right to inspect any documents in the possession of or under the control of the appointing power which are relevant to the adverse action taken and which would be admissible in evidence at a hearing of the employee's appeal from the adverse action. The employee, or the designated attorney shall also have the right to interview other employees having knowledge of the acts or omissions upon which the adverse action was based. Interviews

of other employees and inspection of documents shall be at times and places reasonable for the employee and for the appointing power.

§ 19574.5.

Pending investigation by the appointing power of accusations against an employee involving misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude, the appointing power may order the employee on leave of absence for not to exceed 15 days. The leave may be terminated by the appointing power by giving 48 hours' notice in writing to the employee.

If adverse action is not taken on or before the date such a leave is terminated, the leave shall be with pay.

If adverse action is taken on or before the date such leave is terminated, the adverse action may be taken retroactive to any date on or after the date the employee went on leave. Notwithstanding the provisions of Section 19574, the adverse action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the adverse action.

§ 19575.

No later than 20 calendar days after service of the notice of adverse action, the employee may file with the board a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of adverse action not expressly admitted and a request for hearing or investigation as provided in this article. With the consent of the board or its authorized representative an amended answer may subsequently be filed. If the employee fails to answer within the time specified or after answer withdraws his appeal the adverse action taken by the appointing power shall be final. A copy of the employee's answer and of any amended answer shall promptly be given by the board to the appointing power.

§ 19575.5.

At any time before an employee's appeal is submitted to the board or its authorized representative for decision, the appointing power may with the consent of the board or its authorized representative serve on the employee and file with the board an amended or supplemental notice of adverse action. If the amended or supplemental notice presents new causes or allegations the employee shall be afforded a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further answer unless the board or its authorized representative so orders. Any new causes or allegations shall be deemed controverted and any objections to the amended or supplemental causes or allegations may be made orally at the hearing or investigation and shall be noted in the record.

§ 19576.

Whenever an answer is filed by an employee who has been suspended without pay for 10 days or less the board or its authorized representative shall make an investigation with or without a hearing as it deems necessary; however, in the event an employee is suspended under subdivision (r) of Section 19572 for behavior or acts outside of duty hours, he shall, if he files an answer to the action, be afforded a hearing; or if he is suspended in more than three instances in any calendar year, he shall upon each additional suspension be afforded a hearing if he files an answer to the action.

§ 19578.

Whenever an answer is filed to an adverse action other than a suspension without pay for 10 days or less, the board or its authorized representative shall within a reasonable time hold a hearing. The board shall notify the parties of the time and place of the hearing. Such hearing shall be conducted in accordance with the provisions of Section 11513 of the Government Code, except that the employee and other persons may be examined as provided in Section 19580, and the parties may submit all proper and competent evidence against or in support of the causes.

§ 19579.

Failure of the employee to appear at the hearing shall be deemed a withdrawal of his answer and the action of the appointing power shall be final.

§ 19580.

Either by deposition or at the hearing the employee may be examined and may examine or cause any person to be examined under Section 776 of the Evidence Code.

§ 19581.

The board or its authorized representative shall issue subpoenas for witnesses for the employee upon his written request and at his cost. The board or its authorized representative may require such costs to be prepaid.

§ 19582.

(a) Hearings may be held by the board, or by any authorized representative, but the board shall render the decision which in its judgment is just and proper.

(b) If a contested case is heard by an authorized representative he shall prepare a proposed decision in such form that it may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the board as a public record and furnished to each party within 10 days after the proposed decision is filed with the board. The board itself may adopt the proposed decision in its entirety, or may reduce the adverse action set forth therein and adopt the balance of the proposed decision.

(c) If the proposed decision is not adopted as provided in subdivision (b) each party shall be notified of such action, and the board itself may decide the case upon the record, including the transcript, with or without taking any additional evidence, or may refer the case to the same or another authorized representative to take additional evidence. If the case is so assigned to an authorized representative he shall prepare a proposed decision as provided in subdivision (b) upon the

additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of such proposed decision shall be furnished to each party. The board itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present oral and written argument before the board itself. If additional oral evidence is introduced before the board itself no board member may vote unless he heard the additional oral evidence.

(d) In arriving at a decision or a proposed decision the board or its authorized representative may consider any prior suspension or suspensions of appellant by authority of any appointing power, or any prior proceedings under this article.

(e) The decision shall be in writing and contain findings of fact and the adverse action, if any. The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

§ 19583.

The board shall render a decision within a reasonable time after the hearing or investigation. The adverse action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the adverse action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the adverse action and it may order the employee returned to his or her position either as of the date of the adverse action or as of such later date as it may specify. The decision of the board shall be entered upon the minutes of the board and the official roster.

§ 19583.1.

Dismissal of an employee from the service shall, unless otherwise ordered by the board:

(a) Constitute a dismissal as of the same date from any and all positions which the employee may hold in the state service.

(b) Result in the automatic removal of the employee's name from any and all employment lists on which it may appear.

(c) Terminate the salary of the employee as of the date of dismissal except that he shall be paid any unpaid salary, and paid for any and all unused and accumulated vacation and any and all accumulated compensating time off or overtime to his credit as of the date of dismissal.

§ 19583.5.

Any person with the consent of the board or the appointing power may file charges against an employee requesting that adverse action be taken for one or more causes for discipline specified in this article. The employee against whom such charges are filed shall have a right to answer as provided in this article. In all such cases a hearing shall be conducted in accord with this article and if the board finds that the charges are true it shall have the power to take such adverse action as in its judgment is just and proper.

§ 19584.

Whenever the board revokes or modifies an adverse action and orders that the employee be returned to his position it shall direct the payment of salary to the employee for such period of time as the board finds the adverse action was improperly in effect.

Salary shall not be authorized or paid for any portion of a period of adverse action that the employee was not ready, able, and willing to perform the duties of his or her position, whether such adverse action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline.

From any such salary due there shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension.

§ 19586.

Within thirty days after a receipt of a copy of the decision rendered by the board in a proceeding under this article, the employee or the appointing power may apply for a rehearing by filing with the board a written petition therefor. Within thirty days after such filing, the board shall cause notice thereof to be served upon the other parties to the proceedings by mailing to each a copy of the petition for rehearing, in the same manner as prescribed for notice of hearing.

Within sixty days after service of notice of filing of a petition for rehearing, the board shall either grant or deny the petition in whole or in part. Failure to act upon a petition for rehearing within this sixty-day period is a denial of the petition.

§ 19587.

If the petition for rehearing is granted, the matter shall be set down for hearing by the board of its authorized representative. The hearing shall be conducted as to the matters on which granted in substantially the same manner and under like rules or procedures as an original hearing upon charges under this article.

§ 19588.

The right to petition a court for writ of mandate, or to bring or maintain any action or proceeding based on or related to any civil service law of this State or the administration thereof shall not be affected by the failure to apply for rehearing by filing written petition therefor with the board.